MOTION FILED
JAN 5 1981

No. 80-757

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., TH
MCKINNON, AUCHINCLOSS, KOHLM

v.

NEIL LEIST, PHILIP SMITH, AND

HEINOLD COMMODITIES, INC., TH
MCKINNON, AUCHINCLOSS, KOHLM

v.

NATIONAL SUPER SPUDS, INC.

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE SE

MOTION OF FUTURES INDU ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, and BRIEF *AMICUS CURIAE* IN SUPP THE JOINT PETITION FOR WRIT OF

BARRY J. MANDEL
299 Park Aven
New York, New
(212) 832-1700
Counsel for Futu Association, Inc., Curiae

Of Counsel:
STEPHEN F. SELIG
Baer Marks & Upham
299 Park Avenue
New York, New York 10171
January 5, 1981

TABLE OF CONTE

Motion of Futures Industry Associati
Leave to File Brief *Amicus Curiae*

Brief *Amicus Curiae* of Futures Indu
tion, Inc., in Support of Joint Petit
of Certiorari

Statement of Interest

Summary of Argument

Reasons for Granting the Writ

I. *The Split in the Circuit*
Courts and the Implica
Second Circuit's Decis
Imperative That This C
the Issue of Whether
Private Right of Act
Futures Commission M
ists Under the Commodi
Act

A. *Only this Court can*
split in the circuit
courts

B. *The implications of*
Circuit's decision
this Court address
whether an implied
of action against
mission merchants
the Act

C. *Delay in addressing*
may limit the Cour
resolve the issue at

II. *The Statutory Str*
Militates Against
Right of Actio
Commission Mer

A. *The Act was*
benefit of any

B. *Even if the Act*
benefit of an
such private

C. *The Commodit*
Commission's
tion and the
scheme create
preclude such
action ------

D. *Precedents con*
ties laws ar
the Act ----

Conclusion ----------

TABLE OF AU

CASES

Alken v. *Lerner*, 485 F. Supp.

Arkoosh v. *Dean Witter & Co.*, (D. Neb. 1976) ----------

Cannon v. *University of Chica* (1979) ----------

Cort v. *Ash*, 422 U.S. 66 (1975

Curran v. *Merrill Lynch, Pie* *Inc.*, 622 F.2d 216 (6th Cir. 1

Farmer v. *United Brotherhoo* *Joiners*, 430 U.S. 290 (1977)

Gray v. *Thomson McKinnon S* 3225 (N.D. Cal. Sept. 29, 198

Grayson v. *ContiCommodity S* L.W. 2807 (D.D.C. May 23,

Hirk v. *Agri-Research Council,* Cir. 1977) ----------

International Ass'n of Machi U.S. 617 (1958) ----------

Jones v. *B.C. Christopher &* (D. Kan. 1979) ----------

Leist v. *Simplot*, Nos. 79-740 July 8, 1980) ----------

Milani v. *ContiCommodity S* Supp. 405 (N.D. Cal. 1976)

Mohasco Corp. v. *Silver*, 100 S

National Railroad Passenge *Ass'n of Railroad Passenge*

Piper v. *Chris-Craft Industrie* (1977) ----------

CASES

Rivers v. *Rosenthal & Co*
16, 1980) ----------

R.J. Hereley & Son Co. v
345 (N.D. Ill. 1979) --

San Diego Building Tra
U.S. 236 (1959) -----

Sears, Roebuck & Co. v.
Council of Carpenters,

Securities Investor Prot
U.S. 412 (1975) -----

Stone v. *Saxon & Winds*
1212 (N.D. Ill. 1980) -

Touche Ross & Co. v.
(1979) ----------

Transamerica Mortgage
U.S. 11 (1979) -----

UAW v. *Wisconsin Em*
351 U.S. 266 (1956) -

Witzel v. *Chartered Sy*
343 (D. Minn. 1980) -

STATUTES

Commodity Exchange A
Supp. 11 1978) -----

Commodity Exchange Ac

Commodity Exchange Ac

Commodity Exchange Ac

Commodity Exchange Ac

Commodity Exchange Ac

Commodity Exchange Ac
(1976) ----------

STATUTES

Commodity Exchange
(1976) ----------

Investment Advisors
§ 80b-6 (1976) ----

Securities Exchange A
§ 78j(b)(1976) ----

REGULATIONS

17 C.F.R. § 1.38(a) (19

17 C.F.R. § 1.41 (1980)

LEGISLATIVE HISTORY

H.R. Rep. No. 975, 93d

S. Rep. No. 850, 95th
[1978] *U.S. Code Co*

OTHER AUTHORITY

Bianco, "The Mechanic
lation and Manipula
(1977) ----------

Supreme

HEINOLD C
MCKINNON, A

NEIL LEIST

HEINOLD C
MCKINNON, A

NATION

ON PETITI
UNITED STATES C

MOTI
A

FUTURES
("FIA") respe
Rules of the Su
to file the accom
the joint petitio
son & McKinno
issuance of a w
of Appeals for t

Respondents
ance as *amicus*
this motion.

Petitioners
erred in impl
damages agai
under the Con
§§ 1-24 (1976
to the decisio
of the statute,

FIA is a n
associate mem
markets, and
major banks.
billion dollar
FCM members
contracts trad
behalf of mem

The purpo
behalf of the f
of the economi
public use of t
standards in
and furnish to
curate and reli
ing futures tr
change of ide
and the federa
and preserve f
who trade futu

The Secon
will have enor
leave FCMs su
by the Commo
eral courts a
their actions i
will fragment
Congress to g
and disturb th
anisms create

---

* A contract
Futures Trading
contracts. *See*

While petitioners in this case have filed a detailed, persuasive brief in support of their joint petition for a writ of certiorari, FIA believes that the petition did not address a number of questions of statutory construction and the case law of this Court.

Specifically, petitioners did not have the opportunity to address the recent split in the circuits caused by the unanimous decision of the Court of Appeals for the Fifth Circuit holding that no implied private right of action exists under the Act against FCMs.* In addition, petitioners did not fully address the structure and language of the Act, the propriety of the *Leist* majority opinion's reliance on precedents drawn from the securities field, and the issue of primary jurisdiction. FIA believes that these factors are persuasive in determining whether to grant the petition for a writ of certiorari and, ultimately, to reverse the decision of the Second Circuit.

THEREFORE, FIA respectfully requests leave of this Court to file the accompanying brief *amicus curiae* in support of the point petition for a writ of certiorari.

Respectfully submitted,

BARRY J. MANDEL
299 Park Avenue
New York, New York 10171
(212) 832-1700

Counsel for Futures Industry Association, Inc., As Amicus Curiae

Of Counsel:

STEPHEN F. SELIG
Baer Marks & Upham
299 Park Avenue
New York, New York 10171

January 5, 1981

* *Rivers* v. *Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980) (unanimous opinion).

No. 80-757

IN THE

reme Court of the United States

OCTOBER TERM, 1980

OLD COMMODITIES, INC., THOMSON & NON, AUCHINCLOSS, KOHLMEYER, INC.,
Petitioners,

v.

LEIST, PHILIP SMITH, AND INCOMCO,
Respondents.

OLD COMMODITIES, INC., THOMSON & NON, AUCHINCLOSS, KOHLMEYER, INC.,
Petitioners,

v.

ATIONAL SUPER SPUDS, INC., Et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE OF FUTURES INDUSTRY OCIATION, INC., IN SUPPORT OF THE JOINT PETITION FOR WRIT OF CERTIORARI

rief is submitted on behalf of Futures Industry on, Inc., ("FIA") as *amicus curiae* in support of petition for a writ of certiorari to the United urt of Appeals for the Second Circuit filed by Commodities, Inc., and Thomson & McKinnon, ss, Kohlmeyer, Inc.

MENT OF INTEREST

-profit corporation whose members
rs are futures commission merchants
cial users of futures markets, and
tures trading, including major banks.
its FCM members effect more than
commodity futures trading activity
tract markets[1] on behalf of members
cision of the United States Court of
d Circuit leaves FCMs subject to con-
s of the Commodity Exchange Act (the
1-24 (1976 & Supp. II 1978) by the
Trading Commission (the "CFTC")[2]
l imposes on FCMs the burden of de-
n overlapping, redundant proceedings.

the Second Circuit's decision con-
ons of this Court, the language and
and the legislative history of the Act,
the conclusion that Congress did not
vate right of action. In reaching this
Fifth Circuit recently wrote,

is of the legislative material and de-
ourts on this question, we might add
hysical pursuit of prescience the mind
shadows and mirages in its attempt
nce of such congressional design—a

s an exchange designated by the Commodity
sion to maintain a market for trading futures
U.S.C. § 6 (1976).

vernmental body whose role with respect to
ous to that of the Securities and Exchange
t to securities. However, because of the
tween futures trading and securities trading,
missions, and the regulatory scheme enforced

on which to predicate
n.

313, typed opinion at

r a writ of certiorari
d Circuit's decision

UMENT

bsolute conflict in the
lied private right of
he Act.

t to create a uniform,
lation of the futures
f a wide split among
rivate right of action
the elements of such
rmity.

ovisions addressed to
esigned to promote a
terests of an especial

ect an especial class is
Act's imposition of
ficient to support the
ction exists under the

ubmitting a supplemental
sion. Therefore, we have

VRIT

CT COURTS
RCUIT'S DE-
COURT RE-
ED PRIVATE
ISSION MER-
EXCHANGE

ne circuit and

Appeal have
issents, that
gainst FCMs
Appeals,[6] in
ch a private
nilarly split.
appeals has
d,[7] Seventh,[8]
umbia[12] Cir-

d Cir. July 8,
. Fut. L. Rep.
ari append the

nith, Inc., 622

Dec. 16, 1980).
1980).
466 F. Supp.

Supp. 343 (D.

462 F. Supp.

Supp. 213 (D.

, 48 U.S.L.W.

Exchange
Touche Ro
(1979) ("
old accepta
action unde
441 U.S. 67

THE S
TATES AG
AGAINST F

As this
whether an
must begin
e.g., Transc
U.S. 11, 16

A. The
class

The first
U.S. 66 (19
right of ac
for whose
at 78 (empl
Co. v. *Rigs*
criteria, the
imposition
standards o
tion of duti
give rise to
of a statuto
rights have

[18] *Accord,*
(1979); *Can*
(1979); *Pipe*
(1977).

v. *University of Chica*
cf. Transamerica Mor
11, 19 (1979) (prohib
carry with it a right

Futures trading is
an exchange market.
futures trading excep
has been designated
pursuant to rules ad
proved by the CFT
7a(12) (1976); 17 C.F
futures trading, ma
otherwise rely on the
gress sought to creat
system[20] designed to
purpose. According
tions of a provision o
lar group. *See Cam*
677, 690-92 & n.13 (1

While the Act p
of which forms the g
such prohibition do
another party and
a private right of a
gage Advisors, Inc.
tions 4a, 4b, and 9(b
(1976)) are part of

---

[19] In contrast, secu
market, bought and so
transferred by gift.

[20] *See* Act § 3, 7 U.
2d Sess. 9-10, *reprinte*
2087, 2097-98; H.R. R
Rivers v. *Rosenthal &*
Cir. Dec. 16, 1980).

[21] *Accord, Cort* v.
Investor Protection Co

were not enacted for the prote
particular group.

Judge Friendly observed, a
4b of the Act reaches beyond t
ship to prohibit fraud in the sa
erally, not just when the defrau
party being defrauded. *Leist*,
Seventh Circuit lent some supp
Hirk v. *Agri-Research Council*
(7th Cir. 1977) (holding that se
to conduct before an account r
agency or fiduciary relationship
in this manner, section 4b cle
broad regulatory scheme desig
as a whole; it was not enacted to
cular group.

Similarly, section 4a(1) (7 U
powers the CFTC to impose tra
market participants, but, by the
ute, to protect those who rely o
verse effects of excessive specu

Section 9(b) (7 U.S.C. § 13
statute enacted to enforce and
poses of the Act. It is well settl
of criminal penalties, while not
of action, does not support it eit
enacted for a public purpose.
U.S. 66 (1975). Section 9(b)
merely an enforcement mechani

**B. Even if the Act was cre
especial class, no such pri**

Even if the Act is found to
the benefit of an especial class, it
that members of that class have

In *Transamerica Mortgage Advisors, Inc.* U.S. 11 (1979), this Court refused to imply a of action under section 206 of the Investm Act of 1940, which proscribes conduct almos that prohibited by section 4b of the Act and most identical language. Justice Stewart, w majority, stated,

> Section 206 of the Act here involved c intended to protect the victims of the fra tices it prohibited. But the mere fact th was designed to protect advisers' client quire the implication of a private cause damages on their behalf.

Id. at 24; *see Touche Ross & Co.* v. *Redin* 560, 570, 578 (1979); *Securities Investor Pr* v. *Barbour*, 421 U.S. 412, 421 (1975) (stat enacted specifically to protect customers of b nevertheless does not contain an implied pr action, even in favor of the particular class protected).[22]

C. The Commodity Futures Trading Com sive jurisdiction and the uniform reg created by Congress both preclude such of action.

Given the need to maintain a nationally latory system, section 2 of the Act vests exc tion over futures trading in the CFTC.

---

[22] Moreover, where a statute creates proceeding ment and sets forth a wide range of alternative reme ment mechanisms, this Court has been reluctant to ones. *Transamerica Mortgage Advisors, Inc.* v. *Le* 19-22 (1979); *Touche Ross & Co.* v. *Redington*, 4 (1979); *Securities Investor Protection Corp.* v. *B* 412, 419-21 (1975); *National Railroad Passenger Ass'n of Railroad Passengers*, 414 U.S. 453, 457- relevant sections of the Act are set forth in Judge M *Leist*, slip op. at 4118-24.

provisions" in section 2 of the Act, which state that the jurisdiction of the Securities and Exchange Commission and federal and state courts shall not be impaired, have been closely analyzed by both the Fifth Circuit and Judge Mansfield below. These analyses demonstrate that the savings clause is not to the contrary. *See Rivers* v. *Rosenthal & Co.*, No. 79-1313, typed opinion at 16-17 (5th Cir. Dec. 16, 1980); *Leist*, slip op. at 4170-74 (Mansfield, J., dissenting). This exclusive jurisdiction does not rest solely on expertise, but on a desire to maintain national uniformity in interpretations of the Act. *See* note 20 *supra* and accompanying text.

If the relief provided by the Act proves inadequate to those who have claims against FCMs relief may well be available in state courts under common law contract and tort theories.[23] The situation is analogous to the labor law area where this Court has insisted that primary jurisdiction lies with the NLRB to determine violations of the National Labor Relations Act. This primary jurisdiction has been vested in the NLRB to further Congress' goal of uniform national regulation of labor relations by ensuring that the Act receives interpretations only from a central decision-making body. *See San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-44 (1959). Despite this strong policy, this Court has permitted actions under state common law for such wrongs as trespass and assault. *See, e.g., Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).[24] In this way, the Court has balanced the need to ensure national uniformity in interpretations of federal labor statutes while

---

[23] *See Witzel* v. *Chartered Systems Corp.*, 490 F. Supp. 343 (D. Minn. 1980) (holding that state common law causes of action have not been preempted by the Act).

[24] *Accord, Farmer* v. *United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977); *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617 (1958); *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266 (1956).

permitting the states to afford traditional common law protections to its citizens. The same policy should apply to FCMs and futures trading.

D. Precedents construing the securities laws are not applicable to the Act.

Judge Friendly relied heavily on decisions by this Court and circuit courts finding implied rights of action under the securities laws to sustain his findings of congressional intent. However, the many significant differences between securities markets and futures markets, and in their respective statutory schemes,[25] preclude extensive reliance on securities case law. Both the securities laws and the Act are broad comprehensive statutory schemes designed to suit the needs of their own respective industries. On this basis alone, there is no ground for reasoning that Congress relied on these cases to create a private right of action under the Act.

In addition, as emphasized by this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 570, 578 (1979), whether an implied right of action exists is a fact sensitive issue. Thus each analysis is by its very nature *sui generis*. It is singularly inappropriate to rely on the holdings in one area as evidence that another statute or another section of the same statute supports an implied private right of action.

Whatever the resemblance of section 4b of the Act to the antifraud provisions of the Securities Exchange Act, the Supreme Court has made it clear that its finding of an implied private right of action under section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b) (1976)) has no such precedential value. It has, for example, refused to

---

[25] *See* Bianco, "The Mechanics of Futures Trading: Speculation and Manipulation," 6 *Hofstra L. Rev.* 27, 34 (1977).

a private cause of action under a similarly worded
on in the Investment Advisors Act. *Transamerica*
ge Advisors, Inc. v. *Lewis*, 444 U.S. 11, 19-24 (1979).

CONCLUSION

the reasons stated above, the request for a writ of
ari should be granted and the decision of the United
Court of Appeals for the Second Circuit should be
d.

Respectfully submitted,

BARRY J. MANDEL
299 Park Avenue
New York, New York 10171
(212) 832-1700
Counsel for Futures Industry
Association, Inc. As
Amicus Curiae

nsel:

N F. SELIG
Marks & Upham
rk Avenue
ork, New York 10171

y 5, 1981